

THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICROTEL INN & SUITES,

Plaintiff

v.

WILKES-BARRE VA MEDICAL CENTER,

Defendant

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3:19-CV-734  
(JUDGE MARIANI)

ORDER

AND NOW, THIS 8th DAY OF SEPTEMBER, 2020, upon review of

Magistrate Judge Mehalchick's Report and Recommendation ("R&R") (Doc. 9) for clear error or manifest injustice, **IT IS HEREBY ORDERED THAT** the R&R (Doc. 9) is **ADOPTED AS MODIFIED**:

1. Defendant's Motion to Dismiss (Doc. 6) is **GRANTED AS FOLLOWS**:
  - a. Construing Defendant's Motion to Dismiss on the basis of sovereign immunity as a facial challenge to this Court's jurisdiction,<sup>1</sup> Defendant's Motion to Dismiss is **GRANTED**. Even accepting all allegations in Plaintiff's Complaint as true, a pure application of the law as set forth in Defendant's brief in support of the motion to dismiss (Doc. 7) and Magistrate Judge Mehalchick's R&R (Doc. 9), including *Department of Army v. Blue Fox, Inc.*, 525 U.S. 255

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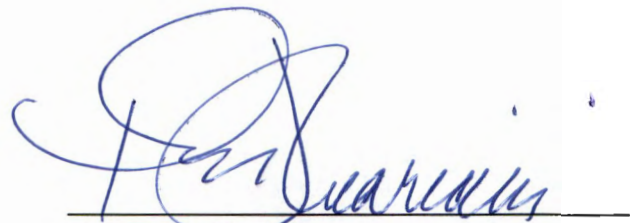
<sup>1</sup> See e.g. *Giovanni v. U.S. Dep't of Navy*, 433 F.Supp.3d 736, 741 (E.D. Pa. 2020) ("The assertion of sovereign immunity as a defense is properly treated as a facial challenge.") (citing *Urella v. Pa. State Troopers Ass'n*, 628 F.Supp.2d 600, 604-605 (E.D. Pa. 2008)).

(1999), demonstrates that Defendant has not waived sovereign immunity and that this Court lacks subject matter jurisdiction over Plaintiff's complaint.

- b. To the extent that Defendant's Motion to Dismiss may otherwise be construed as a factual attack to this Court's jurisdiction, Defendant's Motion to Dismiss is **GRANTED** for the reasons set forth in the R&R (Doc. 9).

2. Plaintiff's action is **DISMISSED WITH PREJUDICE**.<sup>2</sup>

3. The Clerk of Court is directed to **CLOSE** this action.



Robert D. Mariani  
United States District Judge

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<sup>2</sup> This Court notes that, even if subject-matter jurisdiction existed here, Plaintiff's Complaint fails to state a claim upon which relief can be granted, and Plaintiff's failure to retain counsel, respond to Defendant's motion to dismiss, file Objections to the pending R&R, or file any other document of record, demonstrates that it has failed to prosecute this action.